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No. 86-468

In The

Supreme Court of the United States

October Term, 1986

PRESTON R. TISCH, in his capacity as Postmaster General of the United States Postal Serivice,

Petitioner,

v.

DARLENE SHIDAKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Darlene Shidaker, the plaintiff below, files this brief in opposition to the petition for writ of certiorari of Preston R. Tisch, Postmaster General of the United States.

PRELIMINARY STATEMENT

Petitioner posits two arguments in support of granting the petition for writ of certiorari. First, he claims that the promotion procedures complained of by the respondent were "subjective" and should therefore not be considered under a disparate impact model. Second, he asserts that the workforce statistics presented by the respondent are insufficient to establish a *prima facie* case.

The primary issue presented by the petitioner–that the procedures were subjective–has no support in the record and is not raised in this case. Rather, the evidence demonstrates that the promotion procedures and criteria were, in fact, objective. The district court specifically found that the promotion procedures were, in part, objective and that steps were made to objectify the decision making.

Further undermining the petitioner's position is that counsel for the petitioner, contrary to the position he now takes in this Court, consistently argued to the district court that the promotion procedures and criteria were, in fact, objective, and urged the district court to make that finding. Neither did the petitioner appeal the findings of the district court that the procedures were objective.

Thus, if the Court accepts this case for review, it will be required to weigh evidence and reverse findings of fact before ever reaching the issues raised by the petitioner. The Court will also be required to grapple with the fact that petitioner himself asserted a position directly contrary to the one he now argues.

With respect to the statistical issue, petitioner argues here that these statistics are weak, but this again is a factual issue. The Court will thus need to engage in a review of factual findings of the court of appeals that the statistics were significant enough to make out a *prima facie* case. More important, since the court of appeals has remanded this case for the taking of further evidence, it is in an interlocutory stage with an incomplete record and

may ultimately become moot if the petitioner prevails on remand.

Finally, petitioner has manufactured conflicts among the circuit courts on both issues he presents. A review of the contrary cases cited by the petitioner demonstrates that each case turns on its facts and has no factual analogy with this case.

STATEMENT OF FACTS

1. Promotion Procedures

Respondent, a Postal Service employee since 1962, had been the postmaster of the Kennilworth, Illinois Post Office since 1964 at a salary level of PES 18. Pretrial Order Statement of Uncontested Facts (A.F.) No. 1. In 1977, she applied for promotion to three postmaster positions at larger post offices in Palatine, Glenview and Franklin Park, each of which commanded a higher PES 22 salary level. A.F. No. 22, App. 17a-18a.

The procedures for promotion are contained in the Postal Service *Personnel Handbook*, P-11, TL-4, and management received instructions on these procedures. Included in these instructions was a guide to promotion and reassignment. Pl. Exh. No. 23 at 17; Tr. 54-55, 75, 131-133; *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981). A Postmaster Screening Board (the Board) is set up in accordance with these guidelines to review applicants for postmaster positions. This Board is composed of four persons, two directors from other Postal Service districts and two postmasters. App. 19a, Pl. Exh. No. 23, Tr. 117-118, 130-33, 319, 375.

This Board in the first instance reviews the qualifications of the applicants for promotion. Tr. 54. A Board member must be at least at the PES level for the position vacancy being considered. Because there were no females in management above PES 20 level, none were or could have been on the Board considering the three PES

22 postmaster positions for which the respondent applied. Tr. 55, App. 19a.

The Board was to review certain forms and documents relating to the candidates and then score each applicant. The score of each individual Board member was to be added up, and the candidates were then ranked on the basis of the total points received. App. 19a-21a.

There were a number of standardized Postal Service forms the Board reviewed. First was the applicant's "Personal History Summary" or Form No. 991, Pl. Exh. No. 23, 33, Tr. 57, which contained the applicant's education background, Postal Service courses taken and employment experience. *Id.*; Tr. 56. Another form reviewed was the "Estimate of Potential," known as Form No. 2577, prepared by the immediate supervisor of the candidate. Part A of the Form No. 2577, entitled "Potential Ability," lists five subject areas to be rated and nine categories of ratings. *Id.*; App. 19a-21a.

Another form is the five page "Analysis of Experience, Background and Potential", Pl. Exh. No. 33, which requires answers with specific data to questions regarding labor relations, equal employment opportunity, decision making, problem solving, budget operations, employee development, supervision of branch operations, planning and scheduling of work, safety and health, customer and community relations, and the amount of unused sick leave. *Id.*

The Board members testifying at trial stated they relied on extensive statistical data on the operations of the post offices managed by each applicant. Such data on budgets, routes and delivery systems, hours of work of employees, time for deliveries, equipment used and other services of the post offices of applicants were considered. Numerous exhibits with these statistics were admitted on these points. Tr. 65-73, 107-112, 136-140, Jt. Exh.24, Pl. Exh. No. 12, 23, Def. Exh. No. 1-5, 94-95.

Each Board member after reviewing these forms gave

a grade to each candidate. The scoring systems was as follows:

Outstanding candidate:	8-7
Very good candidate:	6-5
Acceptable candidate:	4-3

The scores of each member were then totalled and all those who received a score of 20 and above were found qualified and referred for further review by the Regional Management Selection Board, which then made a recommendation to the Postmaster General. App. 21a. This process was standardized for all promotions. A standardized report was prepared by the panel stating the results, ranking of candidates, and the reasons for rejection of those not referred further. Jt. Exh. 3-7; 9-12, 14-17, 19-20, 26; Def. Exh. No. 7-12; 96-98.

Respondent scored less than 20 and was thus eliminated from further consideration. Of the applicants for each of the three vacancies, respondent was the only female. For the Glenview position she ranked 13 out of 32; for Palatine, she ranked 16 of 32 applicants; for Franklin Park, she ranked 15 out of 28. App. 21a-22a.

The petitioner has a policy of promoting from within, rather than hiring for higher level positions, and experience and training within the Postal Service are key to promotion. App. 19a; Tr. 49-53. Since there are no special qualifications for higher level postmaster positions, the primary reason given by Board members for determining the relative qualifications of candidates was their experience as a postmaster in a large post office or in the Officer in Charge (OIC) program, which offered postmasters direct training for higher level postmaster work. Jt. Exh. No. 7, 14, 17; Def. Exh. No. 7-12, 96-98. Pl. Exh. No. 23 at 6, 14-20, Tr. 338-342, 348-9, 70, 305-08, 294-95, 297,400. Female employees were un-

derrepresented in receiving OIC experience; for the year prior to the promotions in issue, less than 10% of OIC assignments were held by women even though they held 21% of the postmaster positions. Pl. Exh. No. 23 at 14-18; Def. Exh. No. 104.

2. Petitioner's Contentions in the District Court.

Although the petitioner in this Court characterizes the promotion procedures just described as "subjective," this was not his argument in the trial court. Quite the contrary, at virtually every stage of the trial, counsel for petitioner argued that the promotion procedures were, in fact, objective. In his opening statement, counsel asserted that the three forms and other materials used by the Board were objective and essentially statistical. Tr. 21-25, 28-30. At a later stage in the trial, in a colloquy with the Court, counsel argued that the forms were objective and based on "measurable objective data," and the evaluation by the panel itself was "objective." Tr. 171-75. In closing argument, counsel repeated that the promotion procedures "were in fact objective and demonstrated to be so," Tr. 418, 427, and that the materials used were "not subjective." Tr. 174-76. In his trial brief, the petitioner, contrary to the position he now asserts, Pet. at 11-12, argued that the forms used by the panel "are sexually neutral in their potential effect . . . " Pretrial Brief at 9.

The district court, in holding that these promotion procedures may be considered under a disparate impact test, found that they had "both objective and subjective parts," App. at 35a, and that "[w]hile most of the material relied upon by the screeners was subjectively derived, the Screening Board made an effort to objectify its decision." App. at 42a. Petitioner did not challenge any of these findings on appeal. Because these findings were not in issue on appeal, the court of appeals did not discuss in its opinion the question of the applicability of disparate impact analysis to subjective decision making.

3. Statistics

Respondent presented at trial statistics demonstrating that the promotion procedures restricted females in the North Suburban MSC (the area covering the Northern District of Illinois) and nationally to PES 18 level and below. In the North Suburban MSC, women held 21% of the postmaster positions, yet none was rated over a PES 20, and more than 65% of the female postmasters were PES 15 and below. Only 5% of those over PES 19 were female. Nonetheless, women held 29%of the total positions in the North Suburban MSC at that time. While men comprised approximately 70% of the work force, 95% of those over PES 19 were male. App. 24a.

Nationally, female underrepresentation in the upper level PES positions mirrored that in the North Suburban MSC. Although females comprised approximately 21% of the national workforce, they held only 11.5% of the PES 15 and above positions. App. 24a. Men were eight times more likely than women to be promoted to PES 19 positions and above. P1. Exh. No. 23 at 13.

A report circulated to petitioner's employees by the Postmaster General of the United States stated that "white males had . . .three times greater success than women" in attaining high level positions. The report detailed underrepresentation of females in all of the upper level positions of the Postal Service, and concluded that there was serious discrimination against women. P1. Exh. No. 48 at 2.

The Postal Service presented no other statistics on the promotions or PES levels of females, nor any other evidence seeking to explain or refute the statistics which the respondent presented. In answers to interrogatories after remand, petitioner admitted that because "men tended to be found in proportionately greater numbers in supervisory and managerial positions than women . . . they would gain the experience necessary for advancement to higher-level positions in proportionately greater numbers

than women." Resp. to Interrogatories 3 *et seq.* at 2.

The district court found that, although "[g]rossly, the disparities could be significant," App. 37a, respondent had not made a *prima facie* case because she presented no applicant flow statistics. *Id.*

The court of appeals, in reversing the holding that the respondent failed to present a *prima facie* case, found that the lack of applicant flow data does not itself render her case fatal. In light of settled law from this Court as well as other circuits that underrepresentation statistics may be used in a Title VII case, the court held that since the petitioner promotes from within, the disparities presented by respondent were significant enough to establish a *prima facie* case. App. 5a-8a.

The panel explained that the petitioner was free on remand to present more refined statistics or evidence that females in lower level postmaster positions generally did not apply or were not qualified for upper level jobs, or it could demonstrate that the promotion procedures were job related. App. 7a-8a.

On remand from the court of appeals, the petitioner has sought stays of the proceedings, but those motions have been denied by the district court. A date for further hearings below has not been set.

REASONS FOR DENYING THE PETITION

1. The Petition Requires the Court to Review Evidence and the Findings of the District Court.

Certiorari should be denied when the issue presented for review turns on an analysis of specific evidence and will require the Court to review findings of fact by the district court. This Court has stated that "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925); *see, Texas v. Mead,* 465 U.S. 1041 (1984) (Opinion of Justice

Stevens). In the instant case, the petitioner asks that the Court not only to review specific findings of fact, but to reverse findings which were not even challenged in the court of appeals.

Although the petitioner urges the Court to decide whether a disparate impact analysis applies to subjective decision making, the record contains substantial evidence that the promotion procedures were, in fact, objective. This was the position asserted by the petitioner himself in the trial court. The district court as a result found that the procedures were in part objective and that the raters sought to objectify their decision-making. The petitioner did not appeal this finding in the court of appeals.

The record amply demonstrates that the promotion procedures and the criteria considered by Board members were, in fact, objective. The four member all male panel, some of whom were not familiar with candidates, reviewed standardized forms which contained, in part, scores for certain categories of performance, and also contained substantial statistical data on the candidates and the operation of the post offices managed by them. After review of that data, Board members individually applied a scoring system of 3 through 8; the candidates were then ranked on the basis of the total scores, and a cut-off score of 20 was made.

In addition, each Board member who testified stated that the most important basis for his grades was the objective criteria of the type of prior experience and training of the Candidate. A candidate was given greater weight who had experience managing a large post office or had OIC experience. Because females were postmasters at lower PES levels and were not given a sufficient number of OIC training assignments, they did not possess as much managerial experience as men. Petitioner admitted that the failure of females to receive these managerial assignments caused their disproportionately low success rate in promotions to

higher level PES postmaster positions.

The record does not support the factual premise underlying petitioner's claim for certiorari that the procedures challenged by the respondent were, in fact, subjective. Thus, the issue presented by petitioner would require this Court to review the record and reverse findings of fact that the procedures at issue were objective before even reaching the broader legal issue presented by the petitioner.

With respect to the statistical issue, the petitioner likewise requests the Court to weigh evidence and overturn the court of appeal's finding that the respondent's statistics make out a *prima facie* case. Petitioner appears not to attack the use of workforce statistics as such, but the probative value of the statistics presented in this case. This Court has held in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), however, that a plaintiff in a Title VII case may use workforce underrepresentation statistics to prove a case, and that an evaluation of statistical evidence "depends on all of the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324,340 (1977). Thus, a review of petitioner's argument would require the Court to weigh and discuss the statistical findings in light of the entire record.

2. Petitioner's Present Assertion that the Promotion Procedures Were Subjective Contradicts His Position in the District Court.

Although the petitioner now bases his certiorari petition on the fact that the procedures were subjective, he consistently asserted in the district court that the procedures were objective and urged the court to make such findings. After the court entered such findings, the petitioner did not claim in the court of appeals that such findings were clearly erroneous. Petitioner should not now be permitted to argue a position directly contrary to the one he asserted below.

In his opening statement and throughout trial, counsel argued at great length that the forms used and the procedures of the Board were objective and that the promotion decisions were based in large part on statistics and measurable objective data. In closing, the petitioner argued that the promotion procedures were "in fact objective and demonstrated to be so." Tr. 418. Each witness produced by the petitioner testified that his decision was entirely objective and based on objective data, including the extent of the candidate's experience in managing larger post offices or in prior OIC experience. Even in his trial brief, the petitioner claimed that the promotion procedures were neutral in their potential impact.

Petitioner should not be permitted at this point to change his position and create a fictional legal issue for this Court to consider.

3. The Petition Seeks Review of an Interlocutory Order.

This Court has explained that certiorari should not be granted until a final decree is issued unless it is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & R, Co.*, 148 U.S. 372,384 (1893). Lack of finality may "of itself" furnish "sufficient ground for denial of the application." *Hamilton-Brown Shoe co. v. Wolf Bros. & Co.*, 240 U.S. 251,258 (1916); *Firemen v. Bangor & Aroonstock R. Co.*, 389 U.S. 327,328 (1967).

The court of appeals remanded the case for further evidence and findings by the district court. The court stated, App. at 7a-8a, that petitioner has the opportunity to demonstrate the essential subjectivity of the promotion procedures. In addition, with respect to the statistics, the court of appeals did not close the record on the issue. Its limited holding was that the respondent had merely presented a *prima facie* case. On remand, the petitioner

will be free to demonstrate the lack of probative value of the statistics. Petitioner may do so by demonstrating that during the period covered by the statistics, females either did not apply for upper level positions or did not possess the qualifications for those positions. It would be premature for this Court to review the statistics before the record has been fully developed on the issue.

It is quite possible that the petitioner will yet win this case. Certainly, after a further trial, the record will be more developed on factual issues which the petitioner requests this Court to consider now. The petitioner has not demonstrated there will be any extraordinary inconvenience or embarrassment or any dire consequences at all if this Court defers review of this case until the record is further developed and a final judgment is entered. At this interlocutory stage, the case is not ripe for this Court's review.

4. There is No Conflict Among the Circuit Courts.

Rule 17(a) of this Court provides that certiorari may be granted "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." While the petitioner has cited a number of decisions of courts of appeals purportedly in conflict with each other, none involves promotion procedures similar to the ones here. There is thus no conflict among the circuits on the same matter raised in the certiorari petition.

There are, however, two other courts of appeals which have considered Postal Service promotion procedures virtually identical to those here, and in both cases, the courts allowed a disparate impact analysis. In *Hawkins v. Bounds*, 752 F.2d 500 (10th Cir. 1985) [1], a black Postal Service employee sought promotion to a PES

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[1] Petitioner did not cite this case in its petition.

20 position. The procedures were the same as in this case: a board reviewed the applications and then prepared a list of those found qualified which it submitted to the selecting supervisor who then chose the candidate to be promoted. The Postal Service argued in that case, as here, that a disparate impact analysis should not apply to the promotion procedures since they were subjective in nature. The court of appeals rejected that argument and held that a disparate impact claim can be made.

Similarly, another case against the Postal Service, *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985), also squarely holds that subjective promotion procedures are subject to disparate impact analysis. The procedures in *Griffin* utilized by the Postal Service were similar to the ones in issue, and consisted of a review by a panel.

The numerous cases cited by the petitioner which he claims conflict with this one (Pet. at 8-10) all involve completely different employment decisions and are not factually similar to this one. Some of the cases cited by petitioner involve decisions made by an individual supervisor to terminate, demote or not to promote a particular individual.[2] In none of those cases was the supervisor evaluating other candidates for their relative qualifications with each other; each case involved an *ad hoc* decision by one supervisor to take a specific action with respect to one employee. In the instant case, a four member board, rely-

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[2] *Robinson v. Polaroid Corp.*, 732 F.2d 1010 (1st Cir. 1984) (individual decision to terminate); *Pegues v. Mississippi StateEmployment Service*, 699 F.2d 760 (5th Cir.), cert. denied, 464 U.S. 991 (1983) (discretion by individual interviewer to promote); *Coates v. Johnson & Johnson Co.*, 756 F.2d 524 (7th Cir. 1985) (individual decisions to terminate); *Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981) (individual decision to terminate; no specific employment practice identified); *Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120 (9th

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ing on standardized forms with grades and statistical data, gave numerical ratings and then ranked 32 competing candidates. This was not an *ad hoc* decision by one supervisor involving one employee.

In the remaining cases cited by the petitioner, the courts held that no specific employment practice had been identified by the plaintiff.[3] In this case, however, the respondent identified the employment practices—the review by the Board of the forms and grades and its subsequent scoring and ranking of candidates. The record also demonstrates that the objective fact of the lack of postmaster experience in larger offices and of OIC experience was the basis for the disparate impact. Thus, none of the cases cited by petitioner are in conflict with this one or involve issues arising in this case.

Another important factor which distinguishes this case from the others cited is that the petitioner is a federal employer subject to Equal Employment Commission Uniform Guidelines on Employee Selection Procedures (EEOC Guidelines), 29 C.F.R. Pt. 1607 *et seq.* Unlike the private employers in the circuit court cases cited by the

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2 *(Continued)*

Cir. 1985) (individualized hiring and promotion claims; court also states that specific practice is not identified). Co.

[3] *EEOC v. Federal Reserve Bank*, 698 F.2d 633 (4th Cir. 1983), rev'd on other grounds *sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984); *Stasny v. Southern Bell Telephone & Telegraph Co.* , 628 F.2d 267 (4th Cir. 1980); *Latino Unidos v. Secretary of HUD*, 41 Fair Empl. Prac. Cas. (BNA) 839 (1st Cir. 1986); *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795 (5th Cir. 1982); *Taylor v. Teletype Corp.*, 648 F.2d 1129 (8th Cir.), cert. denied, 454 U.S. 969 (1981) (unclear from the opinion whether procedure was identified; disparate impact theory not advanced in the district court); *Tally v. United States Postal Service*, 720 F.2d 505 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984);

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petitioner, the Postal Service as a federal agency is bound by the EEOC Guidelines under §717 (b) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16(b). *See also,* 29 C.F.R. §1607.2 ("These quidelines will be applied ... by the Civil Service Commission and other Federal agencies subject to Section 717 of Title VII ...")

These Guidelines, at §1607.16Q, allow a disparate impact analysis of "*[a]ny* measure, combination of measures or procedures cited as a basis for any employment decision ... [and] include the full range of assessment techniques from traditional paper and pencil tests, training programs or probationary periods and physical, education, and work experience requirements through informal or casual interviews and unscored application forms." *Emphasis added.* The Guidelines also apply to "interviews, review of experience or education from application forms, work samples, physical requirements, and evaluations of performance." EEOC Questions and Answers, Vol. 2, *Employment Practices Guide* (CCH) p. 2253-8.

Thus, the EEOC Guidelines' specific application to all procedures, whether objective or subjective, is binding on this employer, regardless of circuit courts which have held that a disparate impact analysis does not apply to subjective procedures of private employers. For this reason, those decisions cited by petitioner,[4] since they involve private employers, are not analogous and are thus irrelevant.

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3 *(Continued)*

Mortensen v. Callaway,, 672 F.2d 822 (10th Cir. 1982), (unclear from the opinion whether a specific procedure was identified); *but see, Rossini v. Ogilvy & Mather, Inc.,* No. 85-7776 (2d Cir. 1986) (appears to hold that plaintiff cannot challenge the impact of a performance evaluation system; however, plaintiff did not try the case under a disparate impact theory.)

[4] Although *Tally v. United States Postal Service,* 720 F.2d 505 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984), involved the

(Footnote continued on the following page)

For the reasons stated above, there is no conflict among the circuit courts regarding the first issue for review raised by the petitioner.

Neither is there a conflict among the circuit courts on the question whether workforce underrepresentation statistics may be used to establish a *prima facie* case in a promotion challenge when the employer promotes from within. Although the petitioner cites five cases which it claims conflict with the decision below, the cases, in fact, do not stand for the proposition asserted by the petitioner. Those cases are *EEOC v. Radiator Specialty Co,* 610 F.2d 178 (4th Cir. 1979); *EEOC v. Chesapeake & Ohio Railway,* 577 F.2d 229 (4th Cir. 1978); *Metrocare v. Washington Metropolitan Area Transit Authority,* 679 F.2d 922 (D.C. Cir. 1982); *Ste. Marie v. Eastern R. Ass'n.,* 650 F.2d 395 (2d Cir. 1981); *Rivera v. City of Wichita Falls,* 665 F.2d 531 (5th Cir. 1982).

The law is settled that when an employer promotes from within, statistics demonstrating the absence of minority employees in upper level positions in comparison to their presence in the workforce are relevant and can create a *prima facie* case. *Mozee v. Jeffboat,* 746 F.2d 365 (7th Cir. 1984), *Clark v. Chrysler,* 673 F.2d 921, 927 (7th Cir. 1982) cert. denied, 459 U.S. 873 (1982); *Fisher v. Proctor & Gamble Mfg.,* 613 F.2d 527, 544 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981); *Paxton v. Union National Bank,* 688 F.2d 552,563-64 (8th Cir. 1982, cert. denied, 460 U.S. 1083 (1983);

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4 *(Continued)*

same employer, the plaintiff had failed to point to an employment practice and instead engaged in a wide-ranging attack on the fact that black females were discharged. The EEOC Guidelines discussed herein thus had no application to that case since the issue of whether a disparate impact analysis applies to a subjective employment practice, even if identified, was not reached.

Davis v. Califano, 613 F.2d 957, 964-65 (D.C. Cir. 1979); *Chrisner v. Complete Auto Trans. Inc.,* 645 F.2d 1251, 1259 (6th Cir. 1981).

In fact, in the two cases evaluating virtually identical promotion procedures used by the Postal Service, both the Tenth and Eleventh Circuits held that similar workforce statistics of underrepresentation in the upper level jobs in the Postal Service presented a *prima facie* case under Title VII. *Hawkins v. Bounds,* 752 F.2d 500 (10th Cir. 1985); *Griffin v. Carlin,* 755 F.2d 1516 (11th Cir 1985).

In four of the cases cited by the petitioner in which he claims a conflict exists, the courts' decisions turned on the fact that there were special qualifications for the higher level positions in issue, and therefore workforce underrepresentation statistics were not probative of discrimination since persons in the general workforce did not possess those special qualifications. *EEOC v. Radiator Specialty Co.,* 610 F.2d 178 (4th Dist. 1979); *EEOC v. Chesapeake & Ohio Railway,* 577 F.2d 229 (4th Cir. 1978); *Metrocare v. Washington Metropolitan Area Transit Authority,* 679 F.2d 922 (D.C. Cir. 1982); *Ste. Marie v. Eastern R. Ass'n.* , 650 F.2d 395 (2d Cir. 1981). In the instant case, there is no evidence that PES 20 and above postmaster positions require special qualifications, and , in fact, the record indicates otherwise. All of the applicants are postmasters. A number of Board members made clear in their testimony that the primary criteria in their review of these postmasters was not the presence of special qualifications for the higher PES level positions, but their breadth of experience as a postmaster or in the OIC training program. P1. Exh. No. 23 at 14-18. Tr. 70, 74-78, 294-297, 305-308, 342, 348-9, 400, Jt. Exh. No. 7, 14, 17; Def. Exh. No. 7-12, 96-98.

In the other case cited by the petitioner, the court made clear that workforce underrepresentation statis-

tics could be used, but rejected those statistics upon weighing them in light of the entire record after a full trial. *Rivera v. City of Wichita Falls,* 665 F.2d 531 (5th Cir. 1982). Here, the court of appeals has remanded for a full trial.

No conflict exists with respect to the issue of statistics.

CONCLUSION

Respondent respectfully requests the Court to deny the petition for a writ of certiorari.

Respectfully Submitted,

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